

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In re Applications of)

ROBERT J. & LAURIE F. KELLER d/b/a)
WESTERN MARYLAND WIRELESS COMPANY)

WT Docket No. 96-18

For authority to construct and operate new)
one-way signaling facilities in Paging and)
Radiotelephone Service at various locations)
in Maryland and West Virginia as follows:)

931.5875 MHz at Swallow Falls, MD)
931.5875 MHz at Cumberland, MD)
931.5875 MHz at Morgantown, WV)
931.5875 MHz at Keyser, WV)
931.5875 MHz at Friendsville, MD)

File No. 3579195
File No. 3579895
File No. 3580295
File No. 3580695
File No. 3580895

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FEDERAL COMMUNICATIONS COMMISSION
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To: The Commission

APPLICATION FOR REVIEW

Robert J. and Laurie F. Keller d/b/a Western Maryland Wireless Company ("WMWC"), pursuant to Section 1.115(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.115(a), hereby applies for review of the *Order* (DA 98-2543), released December 14, 1998, insofar as it purports to dismiss or authorize the dismissal of the above-captioned applications of WMWC.

The following is respectfully shown in support of this *Application for Review*:

Delegated Authority Action. Attachment No. 1 hereto is a copy of the *Order* that is subject of this *Application for Review*. Also included in Attachment No. 1 are pages 46 and 47 of Attachment A to the *Order* showing the above-captioned applications of WMWC on the list of applications to be dismissed pursuant to the *Order*. The *Order* (DA 98-2543) was adopted and released on December 14, 1998, by the Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, acting pursuant to delegated authority.

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ORIGINAL

Question Presented for Review. Pursuant to Section 1.115(b)(1) of the Commission's Rules and Regulations, 47 C.F.R. § 1.115(b)(1), the question presented for review is:

May the Commission may lawfully dismiss pending mutually exclusive applications that were timely filed and as to which applicable cut-off windows had closed as part of a plan to accept and process additional mutually applications that were not submitted within the applicable cut-off window?

Factors Warranting Commission Review. Pursuant to Section 1.115(b)(2) of the Commission's Rules and Regulations, 47 C.F.R. § 1.115(b)(2), the following factors warrant Commission review of the delegated authority action at issue herein:

- The Bureau action in conflict with Section 309(e) of the Communications Act of 1934, 47 U.S.C. § 309(e), as interpreted by the United States Supreme Court in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), and by the United States Court of Appeals in *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1986).statute, regulation, case precedent, or established Commission policy.
- The Bureau action involves a question of law or policy which has not previously been resolved by the Commission
- The Bureau action constitutes prejudicial procedural error.

Change Requested and Relief Sought. Pursuant to Section 1.115(b)(3)-(4) of the Commission's Rules and Regulations, 47 C.F.R. § 1.115(b)(3)-(4), the Bureau action should be changed by reinstating the captioned applications and affording them with full comparative consideration together with any timely filed mutually exclusive applications. In this regard, only mutually exclusive applications filed within the applicable cut-off window established at the time the applications were filed should be considered.

The justification for this *Application for Review* are set forth in the *Petition for Reconsideration* filed by WMWC on April 14, 1997, which is incorporated herein by this reference. A reference copy of the *Petition for Reconsideration* is appended hereto as Attachment No. 2.

Respectfully submitted this 15th day of May, 1998

**Robert J. and Laurie F. Keller d/b/a
Western Maryland Wireless Company**

By: 

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Revision of Part 22 and Part 90) WT Docket No. 96-18
of the Commission's Rules to Facilitate)
Future Development of Paging Systems)

ORDER

Adopted: December 14, 1998

Released: December 14, 1998

By the Chief, Commercial Wireless Division:

I. INTRODUCTION

1. By this *Order*, the Commercial Wireless Division (Division) dismisses all pending mutually exclusive paging applications; all pending paging applications (other than applications for nationwide and shared channels) filed after July 31, 1996; and all pending paging applications that request spectrum that was previously assigned to another licensee on an exclusive basis.

II. BACKGROUND

2. In August 1993, the Omnibus Budget Reconciliation Act of 1993 added Section 309(j) to the Communications Act of 1934, as amended.¹ Section 309(j) accorded the Commission authority to use competitive bidding procedures to select among mutually exclusive applications for initial licenses under certain circumstances. More recently, the Balanced Budget Act of 1997 expanded the Commission's authority, and statutory mandate, to use competitive bidding to choose from among mutually exclusive license applicants.²

3. In February 1997, the Commission released the *Second Report and Order* in WT Docket No. 96-18, in which it adopted final rules effecting a transition to geographic area licensing for exclusive, non-nationwide paging channels in the 35-36 MHz, 43-44 MHz, 152-159 MHz, 454-460 MHz, 929-930 MHz, and 931-932 MHz bands and competitive bidding procedures for selecting among mutually exclusive

¹ Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993) (codified at 47 U.S.C. § 309(j)).

² Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a)(1)(A)(i)-(2), 111 Stat. 251 (1997) (amending 47 U.S.C. § 309(j)).

applications for geographic area non-nationwide paging licenses.³ In order to facilitate this transition to geographic area licensing, the Commission also decided that all pending mutually exclusive paging applications and all paging applications filed after July 31, 1996, other than applications for nationwide and shared channels, would be dismissed.⁴ The Commission further decided that, with certain limited exceptions, no additional site-by-site applications other than for shared channels would be accepted.⁵

III. DISCUSSION

4. Pursuant to the *Second Report and Order*, the Division hereby dismisses all pending mutually exclusive paging applications in the 35-36 MHz, 43-44 MHz, 152-159 MHz, 454-460 MHz, 929-930 MHz, and 931-932 MHz bands. These applications are listed in Attachment A. We also dismiss all pending paging applications, other than applications for nationwide or shared channels, filed with the Commission after July 31, 1996. These applications are listed in Attachment B.⁶ Finally, pursuant to section 22.128(e)(2) of the Commission's rules, we dismiss all pending paging applications that request spectrum that was previously assigned to another licensee on an exclusive basis in accordance with the exclusivity rules established in 1993.⁷ These applications are listed in Attachment C.

5. We note that a number of parties have submitted petitions seeking reconsideration of the Commission's decision in the *Second Report and Order* to dismiss mutually exclusive paging applications and paging applications filed after July 31, 1996. These petitions are pending before the Commission. If the Commission determines on reconsideration that these applications should not be dismissed, the applications listed in Appendix A and Appendix B will be reinstated.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that, as of the adopted date of this *Order*, all pending mutually exclusive paging applications for use in the 35-36 MHz, 43-44 MHz, 152-159 MHz, 454-460 MHz, 929-930 MHz, and 931-932 MHz bands, as set out in Attachment A of this *Order*, ARE DISMISSED without prejudice.

7. IT IS FURTHER ORDERED that all paging applications for use in the 35-36 MHz, 43-44 MHz, 152-159 MHz, 454-460 MHz, 929-930 MHz, and 931-932 MHz bands filed after July 31, 1996, as set out in Attachment B of this *Order*, ARE DISMISSED without prejudice.

³ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 2732 (1997).

⁴ *Id.* at 2739-40, ¶ 6.

⁵ *Id.* The exceptions were applications filed pursuant to 47 C.F.R. §§ 22.369 and 90.177, applications filed for coordination with Mexico and Canada, and applications required under 47 C.F.R. § 1.1301 *et seq.*

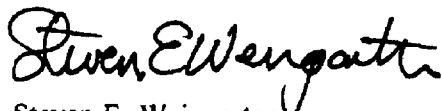
⁶ *Second Report and Order*, 12 FCC Rcd. at 2739-40, 2827, ¶¶ 6, 227.

⁷ 47 C.F.R. § 22.128(e)(2); Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, *Order*, 8 FCC Rcd. 8318 (1993).

8. IT IS FURTHER ORDERED that, pursuant to Section 22.128(e)(2) of the Commission's Rules, 47 C.F.R. § 22.128(e)(2), all paging applications requesting spectrum that was previously assigned to another licensee on an exclusive basis, as set out in Attachment C of this *Order*, ARE DISMISSED.

9. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Steven E. Weingarten". The signature is written in a cursive style with a large, stylized "S" and "W".

Steven E. Weingarten
Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

3553995	TONY D. MARTINEZ, JR.
3554095	PAUL W BOECKMAN
3554195	ELSIE HESSELBARTH
3554395	DOUGLAS NONAKA
3554495	HAROLD J RUBEL
3554595	MARCIA FABIAN
3554695	ROBERT F. WOLTER
3554895	BRUCE A. MCKEE
3555195	DAVID SELL
3557495	LA VERN J. RIPPLEY
3557895	SATELLITE PAGING, INC
3536995	DON C MCILVAINE
3538095	JIMMIE MARICLE
3538595	DAVID SELL
3539595	MARVIN SELL
3539995	PHILLIPP E BEAUCHAMP
3540195	WILFRED C HAINES SR
3540695	MARVIN SELL
3541395	ROBERT A WILLIAMS
3541695	GEORGE L CARR
3542795	PHILLIP BURKHARDT
3543695	JO ANN ROSS
3544195	CHARLES KASE
3544595	HOWARD R. IRVIN, JR.
3547795	DAVID SELL
3548095	FLORAJANE HOLOHAN & MARG. J. VAN HAAREN
3548695	MOBILFONE SERVICE, L.P.
3548995	DAVID SELL
3549295	RICHARD D. & BARBARA A. FERGUSON
3549695	ROMAN H. MASSENBERG
3550295	DON C. MCILVAINE
3526695	WORD COMMUNICATIONS
3528795	WORD COMMUNICATIONS
3529495	KENNETH D. MARY
3533595	LAVERNE J. WILLIAMS
3552395	WORD COMMUNICATIONS
3582095	RICHARD GOTTLIEB
3582295	JOHN RITCHIE
3582395	GIUSEPPE ZUFOLO
3582495	JOHN T. RITCHIE
3582595	LYNN LOWE
3582795	LOIS COHEN
3582895	ROBERT PRUNTY
3583095	KENNETH D. MARY
3579195	ROBERT J. AND LAURIE F. KELLER
3533995	PAM AM LICENSE HOLDINGS, INC.
3534295	PAM AM LICENSE HOLDINGS, INC.
3534795	PRIORITY COMMUNICATIONS, INC.
3536095	PAM AM LICENSE HOLDINGS, INC.
3548895	PAM AM LICENSE HOLDINGS, INC.

3549095	PAM AM LICENSE HOLDINGS, INC.
3549395	PRIORITY COMMUNICATIONS, INC.
3549795	PRIORITY COMMUNICATIONS, INC.
3553195	PAM AM LICENSE HOLDINGS, INC.
3553695	PAM AM LICENSE HOLDINGS, INC.
3554995	PAM AM LICENSE HOLDINGS, INC.
3555095	PAM AM LICENSE HOLDINGS, INC.
3558695	PAM AM LICENSE HOLDINGS, INC.
3558795	PAM AM LICENSE HOLDINGS, INC.
3579895	<u>ROBERT J. AND LAURIE F. KELLER</u>
3580295	<u>ROBERT J. AND LAURIE F. KELLER</u>
3580695	<u>ROBERT J. AND LAURIE F. KELLER</u>
3580895	<u>ROBERT J. AND LAURIE F. KELLER</u>
3525395	TCC PAGING COMPANY
3526395	PAGING NETWORK OF TENNESSEE, INC.
3524795	METROCALL USA INC
3533695	ANNA K. DAVIS
3535995	KARIN CHEN
3536195	KARIN CHEN
3537195	MICHAEL A. FASTWCA
3539495	CHISTOPHER L. MORGAN JR
3539895	ANDREA CLARKE BUFFINGTON
3540495	GLENN ROSS RIDDELL
3542395	ANNA K. DAVIS
3543295	GERALD BERTRAM CARGMAN
3543995	LELAND O. SKOWEN
3544795	JOSEPH F. ENOS
3545595	DOROTHY WHITE DURHAM
3545995	ROBERTA CUIE DEROSE
3559195	WILLIAM HAROLD RILEY
3562195	JACKIE BRYAN FOXWORTH
3562495	NORMAN K. BREWER
3564995	DOUG AND DELORIS NEWFIELD
3565995	PATSY R. MAY
3527395	ROBERT J. BERNAS
3538895	GLENN E. JOHNSON
3539795	CLIFFORD E. HAINES
3542495	DORIS K. LAUGHMAN
3544295	RUTH I. BERTRAM
3545795	JOANNE BAKEWEKLL
3546495	SAMIRA M. HADDED
3546795	JOANNE BAKEWELL
3546995	JEFFRY & DIANNE YAKE
3550095	AIRTOUCH PAGING
3550695	MIKE MULLEN
3550895	MADISON & ELEANOR SIPPERLY
3555495	MADISON & ELEANOR SIPPERLY
3555595	MADISON & ELEANOR SIPPERLY
3555695	MADISON & ELEANOR SIPPERLY
3555795	MADISON & ELEANOR SIPPERLY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 14 '97
FEDERAL COMMUNICATIONS COMMISSION
CLERK

In the matter of]	
]	
Revision of Part 22 and Part 90 of the]	WT Docket No. 96-18
Commission's Rules to Facilitate Future]	
Development of Paging Systems]	
]	
Implementation of Section 309(j) of the]	PP Docket No. 93-253
Communications Act -- Competitive Bidding]	
To: The Commission		

PETITION FOR RECONSIDERATION

Petitioner, Western Maryland Wireless Company (Robert J. and Laurie F. Keller, d/b/a),¹ pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), and Section 1.429(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.429(a), hereby respectfully seeks reconsideration of the *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-59 (released 24 February 1997), __ FCC Rcd __, 6 CR 2, 62 Fed. Reg. 11,615 (12 March 1997),² in the above-captioned rulemaking proceedings, in support whereof, the following is respectfully shown:

Petitioner's request for reconsideration is limited to a single aspect of the *Second Report and Order*, namely, the Commission's announcement that "[a]ll pending mutually exclusive applications for paging licenses filed with the Commission on or before the adoption date of this *Order* will be dismissed." *Second Report and Order* at ¶ 2. The Commission offered very little explanation of or justification for this decision, stating only that such applications were being dismissed "[d]ue to the transition to geographic area licensing." *Id.* at ¶ 6. Beyond that terse statement, the matter is not further discussed until the final ordering clause wherein the Wireless Telecommunications Bureau is given delegated authority to "to dismiss all mutually exclusive paging applications." *Id.* at ¶ 227.

Petitioner has pending and potentially mutually exclusive applications for 931 MHz facilities comprising a proposed regional CMRS paging system with five locations in western Maryland and nearby

¹ Petitioner is a husband and wife partnership with pending and potentially mutually exclusive applications for 931 MHz facilities comprising a proposed regional CMRS paging system with five locations in western Maryland and nearby portions of West Virginia. See footnote 3, below.

portions of West Virginia.³ These applications were filed in full accordance with the "cut-off" rules then applicable to mutually exclusive applications. Petitioner respectfully submits that the *Second Report and Order*, insofar as it calls for dismissal of otherwise timely and proper pending mutually exclusive applications, violates the applicants' comparative consideration rights under Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), as interpreted by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 90 L. Ed. 108, 66 S. Ct. 148 (1945). The pending mutually exclusive applications were filed under and were subject to either the sixty day cut-off procedures applicable under the previous Section 22.31 of the Commission's Rules, or the thirty-day notice and cut-off group procedures of the current Section 22.131 of the Rules. 47 C.F.R. § 22.131.⁴ Either way, the applications were filed pursuant to Commission's established cut-off procedures and the applicable cut-off windows have closed.

Now, however, the Commission moves to dismiss the applications for no reason other than its desire to accept new applications so that it may conduct auctions for the subject spectrum. Potential new applicants for the proposed spectrum auctions are being told, in effect, that the previously established cut-off windows will not be enforced against them. The pending mutually exclusive applications will be dismissed without prejudice to their resubmission in accordance with the spectrum auction rules, but this is little comfort. The pending applicants, who played by the established rules and achieved protected cut-off window status, are now being told that the rules are being changed and that more applicants will be invited to the party. This is not only unfair and inequitable, it is also unlawful.

The proposed dismissal of the pending mutually exclusive applications is violative of the applicants' statutory due process rights. This very issue was recently addressed by the United States Court of Appeals for the District of Columbia Circuit. In two cases, *McElroy Electronics Corp. v. FCC*, 990

² This petition for reconsideration is being timely filed within thirty days of the publication of the *Second Report and Order* in the Federal Register. 47 C.F.R. §§ 1.4(b)(1) & 1.429(d).

³ FCC File Nos. 35791-CD-P/L-95 (Swallow Falls MD), 35798-CD-P/L-95 (Cumberland MD), 35802-CD-P/L-95 (Morgantown WV), 35806-CD-P/L-95 (Keyser WV), 35808-CD-P/L-95 (Friendsville MD). Due to the unique procedures applicable to 931 MHz paging applications, Petitioner is not certain whether its applications are indeed mutually exclusive with any other filings. To the extent that they are, however, the *Second Report and Order* calls for their dismissal. For the reasons stated in this petition, such dismissal would be contrary to applicable law.

⁴ The cut-off rules and procedures were modified and recodified (from 22.31 to 22.131) in the "Part 22 Re-Write" (CC Docket Nos. 92-115, 94-46 & 93-116) such rule changes becoming effective 1 January 1995. Some of the pending mutually exclusive applications were filed prior to and some after the effective date of the modified rules. In both cases, however, the rules protect pending applicants from further mutually exclusive filings after the applicable cut-off window has closed.

F.2d 1351 (D.C. Cir. 1993) ("*McElroy I*") and *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) ("*McElroy II*"), the Court evaluated the Commission's attempts to deal with the transition as it changed the rules and procedures for "fill-in" or "unserved area" cellular applications. A recitation of the pertinent facts of the *McElroy* cases, and the Court's decisions therein, will make clear that the action proposed by the Commission in this proceeding is equally improper.

Cellular rules provide for the issuance of hybrid applicant-defined / geographic licenses, giving the initial licensee exclusive rights to an FCC-defined market area for a period of five years, thereby affording the initial licensee time to "build-out" its system. The regulations originally provided that, at the end of the five year build-out period, third parties were free to apply for authorizations to fill-in any areas in the market not being served by the initial licensee. The rules further provided that such applications would be processed under a 60-day public notice cut-off window, *i.e.*, to be entitled to comparative consideration with such a fill-in application, any mutually exclusive application must be submitted within 60 days of the public notice announcing the first filed application.

In reliance on these rules, *McElroy Electronics Corporation* and a few other parties filed fill-in applications in several markets upon the expiration of the applicable five-year for an MSA or an RSA. These applications were listed on public notice as accepted for filing, prompting the timely filing of some mutually exclusive applications from additional parties. Long after the 60 day cut-off window had closed, the Commission dismissed all of these applications on the theory that they were premature, insofar as the Commission had not yet developed specific rules for processing such applications. The Court disagreed, holding that the applications were filed in justifiable reliance on the rules in effect at the time the applications were filed. Accordingly, the matter was remanded to the Commission with instructions to reinstate the fill-in applications. *McElroy I*, 990 F.2d 1351.

In the meantime, the Commission adopted new regulations for what it decided to call "unserved area" applications. There were some marked differences between the new "unserved area" procedures and those that had previously applied to "fill-in" applications. First, the Commission decided to move to a geographic licensing scheme for unserved area filings, so that an application for any portion of an unserved area in a given market would be deemed mutually exclusive with any other application for any

other unserved area in that market, regardless of actual conflict.⁵ Under the older rules, fill-in applications were deemed mutually exclusive only if their applicant-defined CGSAs overlapped. Second, the Commission replaced the public notice and 60 day cut-off window procedure with date-specific filing windows to be announced for each market. Third, the Commission decided to use random selection procedures (lotteries) to choose among mutually exclusive applicants. The Commission had not yet made an affirmative determination of what method to use to resolve mutually exclusive applications filed under the older fill-in rules.

Pursuant to these new rules, the Commission accepted numerous unserved area applications, including many for markets in which the fill-in applications at issue in *McElroy I* had been filed. Having now received these newer applications and having scheduled a lottery, the Commission had to decide how to address the Court's mandate to reinstate the older applications. The Commission decided to reinstate the fill-in applications and include them in the scheduled lottery along with the newly-filed unserved area applications. The Court rejected this approach, holding that the fill-in applicants were entitled to the protection of the cut-off procedures with which they had fully complied and upon which they had reasonably relied:

The notice and cut-off procedure serves the public's interest in administrative finality and prompt issuance of licenses. Furthermore, as against latecomers, timely filers who have diligently complied with the Commission's requirements have an equitable interest in enforcement of the cut-off rules. *Florida Inst. of Tech.*, 952 F2d at 554; *City of Angels*, 745 F2d at 663. To serve these purposes, the court has frequently affirmed the Commission's strict enforcement of its rules. See *Florida Inst. of Tech.*, 952 F2d at 550 (citing *Salzer v. FCC*, 778 F2d 869, 875 (DC Cir 1985)). Moreover, the Commission may not decline to enforce its deadlines so long as the rules themselves are clear and the public notice apprises potential competitors of a mutually exclusive application. *Reuters*, 781 F2d at 949-51 & n.5.

McElroy II, 86 F.3d at 275.

The situation here is indistinguishable in any significant sense from that addressed in *McElroy II*. Here, as in *McElroy II*, the Commission has before it pending applications that were timely filed in justifiable reliance on established cut-off rules, and the applicable cut-off windows under those rules have closed. Here, as in *McElroy II*, the Commission has moved from applicant-defined service areas to

⁵ This is the typical process used by the Commission in geographic licensing. First adopted for cellular lotteries, it serves administrative convenience by avoiding the need to determine mutual exclusivity on an application-by-application basis.

geographic licensing, and has changed the method of choosing among mutually exclusive applicants.⁶ Here, as in *McElroy II*, the applications filed pursuant to the new rules would be mutually exclusive with the prior-filed applications and, under the old cut-off rules, untimely. In *McElroy II* the Commission attempted to avoid this dilemma by simply including the old applications in the new lottery. Here the Commission attempts a slightly different approach. It proposes to dismiss the old applications, but to allow those applicants to refile for the future auction. But this distinction is without meaningful difference. The gravamen of the *McElroy II* holding is that those applicants who have relied in good faith on duly adopted public notice and cut-off procedures may not have their justifiable rights and expectations dashed simply because the Commission has decided to change the way it does things in the future. It is thus irrelevant *how* the Commission goes about undermining the applicable cut-off rules, because *any* method of doing so is unlawful.⁷

Petitioner and other applicants with pending mutually exclusive 931 MHz paging applicants submitted their applications in good faith reliance on the applicable public notice and cut-off regulations. The cut-off windows have closed, and these applicants are therefore entitled to have their applications processed without the threat of new mutually exclusive filings. The Commission proposal to dismiss the pending applications simply so that it may accept new applications for an auction flies in the face of the pending applicants' due process rights as enunciated in Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), as interpreted by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 90 L. Ed. 108, 66 S. Ct. 148 (1945) and *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) ("*McElroy II*").

⁶ The Commission may, of course, change the method by which it will choose among the timely filed mutually exclusive applicants. See *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987) (upholding the Commission's application of lotteries to mutually exclusive applications that had been filed in anticipation of comparative hearings). But the Commission may not, in the process, negate the cut-off rights of timely filed applicants.

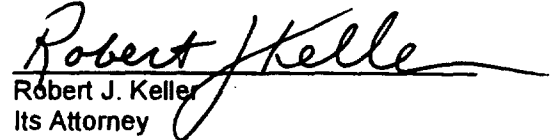
⁷ Even if the proposed dismissals were not unlawful *per se*, it would nonetheless be incumbent upon the Commission to explain and justify why it is reaching a decision here that is markedly different from the one it reached in similar circumstances in another matter. Specifically, when recently confronted with precisely the same issue in the wireless cable (MMDS) proceeding, the Commission decided to retain pending mutually exclusive applications on file and to process them under the rules in effect at the time they were filed, even deciding to retain lotteries rather than using the newly-adopted auction procedures. *Report and Order in MM Docket No. 94-131 & PP Docket No. 93-253* (FCC 95-230), 78 RR 2d 856 at ¶¶ 87-93 (1995). Most of the reasons cited by the Commission for its decision there (fairness to the applicants, previous processing delays, potential further delays in processing and implementation of service, etc.) are equally applicable here.

WHEREFORE, the Commission should reconsider that aspect of the *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-59 (released 24 February 1997), __ FCC Rcd __, 6 CR 2, 62 Fed. Reg. 11,615 (12 March 1997), that contemplates dismissal of all pending mutually exclusive applications should be reconsidered. The pending applications should be retained on file and processed without being subjected to any new mutually exclusive applications that would be untimely under the cut-off rules in effect at the time the pending applications were filed.

Respectfully submitted,

**Robert J. and Laurie F. Keller d/b/a
Western Maryland Wireless Company**

By:


Robert J. Keller
Its Attorney

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Dated: 14 April 1997